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Investigation of a Criminal Case— Evaluation of the Process

by Cynthia K. Hitt

An investigation of the facts, whether by discovery or by the employment of an investigator, is a crucial part of any case, and its importance cannot be over-emphasized. Although in some cases the facts may seem self-evident at the end of the client interview or the discovery proceedings, in other cases the facts may be so convoluted that the case warrants a thorough investigation. For practical as well as legal considerations, the attorney should delegate the responsibility of an investigation to an investigator. In criminal cases, the primary investigators for the prosecution are the police; therefore, defense attorneys must look to other sources. The Public Defender's Office has an investigative division, and Public Defenders or court-appointed attorneys should make full use of these investigative resources. Other criminal defense attorneys should seriously consider the employment of a private investigator.

This article is an overview of the investigative process in criminal cases and the legal significance of the use of an investigator and the investigative product during the pre-trial and the trial stages.

Practical and Ethical Considerations

A criminal defense lawyer is obligated by both his responsibility to his client and his responsibility as a member of the Bar to conduct a thorough investigation of his client's case. See *Standards Relating to the Administration of Criminal Justice*, 2d Ed., "The Defense Function," Part 4-4.1 (1974). Failure to do so may leave the attorney open to a charge of ineffective assistance of counsel, which a convicted defendant may later use as grounds for reversal. *Kelly v. Warden*, 468 F. Supp. 965 (D. Md. 1979). The attorney, however,

should not consider conducting the investigation himself. Just as it is more cost efficient to delegate legal research to a law clerk, it is more cost effective to delegate investigations to an investigator. Most attorneys do not have the time that is necessary to conduct a thorough investigation. Moreover, the attorney must abide by ethical considerations. In accordance with the Code of Professional Responsibility, a lawyer cannot act as both advocate and witness. Md. Ann. Code, Vol. 9C, Appendix F, DR 5-102(A) (1977). Thus, if the attorney investigates the case, interviews witnesses and later finds it necessary to impeach a witness, the attorney must either forego the impeachment testimony or withdraw from the case in order to testify. See *Standards Relating to the Administration of Criminal Justice*, 2d Ed., "The Defense Function," Part 4-4.3(d) (1974). An investigator, on the other hand, may be called to testify just like any other witness. If the investigation has been conducted properly and professionally, the investigator's testimony may function as an effective impeachment tool.

The hiring of an investigator and the delegation of the investigation to that person does not relieve the attorney of his responsibility to his client or to the Bar. The lawyer is responsible for the conduct of his investigator; as an agent of the attorney, the ethical considerations that guide an attorney must also guide the investigator. See Code of Professional Responsibility, Md. Ann. Code, Vol. 9C, Appendix F, DR 1-102(A)(1977). Therefore, the attorney should hire an investigator who is conscientious, honest, professional and personable.

To determine whether an investigator has these qualities, the at-

torney may consider the investigator's "court track record," the type of case and the type of investigator. The attorney, when looking into the investigator's "court track record," should consider how many times the investigator has testified in court and for what purpose the testimony was offered: to impeach a witness or to present demonstrative evidence. The attorney might ask to see any notes the investigator may have of that testimony. He might then consider talking to the prosecutor to find out how the investigator responded to cross-examination and how the jury responded to the investigator's testimony. Only some cases will be important enough to go through this rather extensive background search to insure the best investigative help possible.

In addition to the investigator's background, the attorney should consider the type of case being investigated. For instance, a simple case may not require the more experienced investigator who may charge more for his services. The attorney should also match the type of case with the type of investigator. For example, in a sex offense case, a female victim is more likely to respond to a female rather than to a male investigator.

The best way to evaluate the effectiveness of an investigator is to hire a person who seems to be competent and qualified; then after the investigation has begun, closely scrutinize the investigator's work during the early stages. This evaluation may be handled two ways, and both are recommended. After the investigator has conducted one or two interviews, the attorney should sit down with the investigator and go through the details of the interview. How did the investigator identify himself? How did he ask questions? If the investigator obtained a signed statement from the witness, how did he take the statement? After writing the statement did the investigator read the statement to the witness? If the in-

vestigator did not obtain a statement, when and where did he write his report of the interview? The underlying theme of this type of evaluation is whether the investigator was effective in getting the information in such a way as to protect the integrity of both the information and the investigator.

The investigator should properly identify himself, the attorney and the defendant. Otherwise, the witness may allege that the investigator misrepresented himself, i.e., as the police. The investigator should ask open-ended questions so that he will not be accused of putting words in the witness' mouth, and the investigator should write the statement in the witness' own words. If given the opportunity to write the statement themselves, witnesses tend to leave out important details. After a statement is taken, the investigator should always read the statement to the witness, since some witnesses are too embarrassed to admit that they cannot read. Reading the statement back to the witness safeguards against the loss of impeachment material at trial by a claim of illiteracy. If the investigator did not obtain a statement, he should make a written report of the interview. Given the fact that most memories fade with time, this report should be written immediately after the interview, otherwise the investigator's memory of the details is open to attack upon cross-examination.

Looking for answers to the questions stated above, the second way to evaluate the investigator, in lieu of a sit-down discussion, is for the attorney to accompany the investigator on some of the initial interviews. The attorney can then conduct a first-hand evaluation of the investigator at work. Accompanying the investigator also allows the attorney to assess the demeanor and credibility of the witness. Thus, accompanying the investigator whenever possible is recommended. The attorney, therefore, should also look for an investigator with whom he can work closely.

The Necessity of Investigation Pre-Trial

A. Discovery

Investigation of the case is often necessary despite the fact that discovery between the State and the defense is provided for in Md. R.P. 741. The detailed information available to a defense attorney under this Rule is scant. For instance, the Rule requires that the State must, upon request by the defense, disclose the names and addresses of the witnesses the State intends to call at trial. Md. R.P. 741(b)(1). However, the State is not required to disclose the names and addresses of all potential witnesses to the crime or all of the witnesses spoken to by the police. Furthermore, the State is not required to disclose prior statements made by its own witnesses, *Bailey v. State*, 16 Md. App. 83, 294 A.2d 123 (1972), or the substance of the testimony to be elicited from the State's witnesses, *Presley v. State*, 6 Md. App. 419, 251 A.2d 622 (1969). Although both *Bailey* and *Presley* were decided under the former Rule 728, now repealed, the same principles have been held to apply to Rule 741. *Carr v. State*, 284 Md. 455, 397 A.2d 606 (1979). Rule 728 was more limited in the scope of the State's disclosure to the defense. Despite the fact that the new Rule 741 is more liberal than its predecessor, the Court of Appeals of Maryland has held that the State is not obligated to permit inspection of statements made by non-witnesses. *Yuen v. State*, 43 Md. App. 109, 403 A.2d 819 (1979). Thus, the only statements actually available to the defense during discovery are those of an exculpatory nature which are required to be disclosed by the State even without a request from the defense, *Brady v. Maryland*, 373 U.S. 83 (1963); See Md. R.P. 741(a)(1), and those statements made by a co-defendant unless severance has been ordered by the court, Md. R.P. 741(b)(3). Thus, because of the limited nature of pre-trial discovery, a thorough investigation by a defense investigator is often necessary to

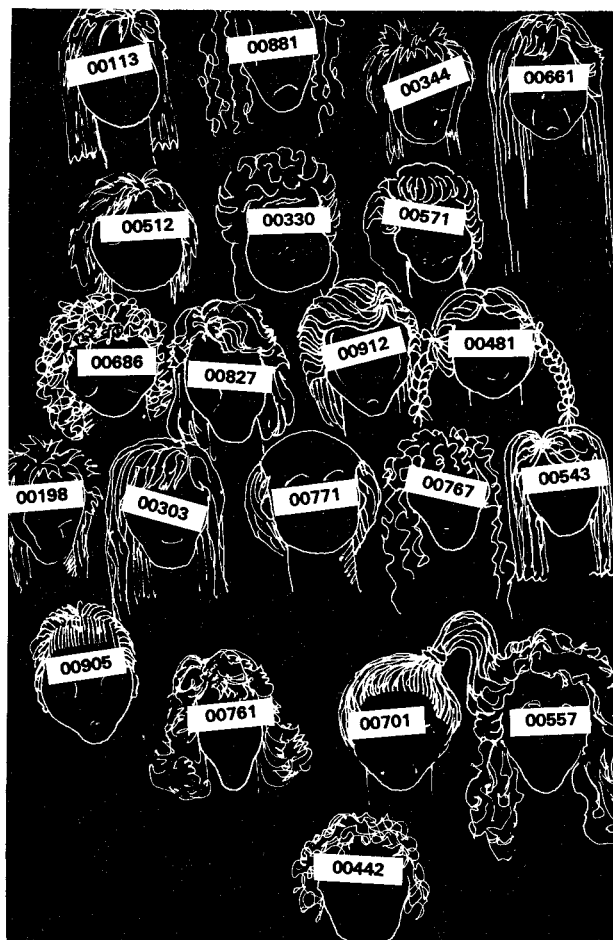
gather all the facts needed for an adequate defense as well as a thorough understanding of the case.

B. Plea-Bargaining

In certain circumstances, the information gathered through an investigation is useful at the plea-bargaining stage. The investigation may reveal that the defendant is a first time offender who was really in the wrong place at the wrong time with a co-defendant who, not only planned the crime on the spot, but also pulled the trigger. When such a situation is revealed, the State may be inclined to be lenient. Similarly, a defendant charged with murder in the first-degree actually acted in self-defense, and, unknown to the prosecution, the investigation reveals two witnesses whose testimony will be favorable to the defendant. In such cases, the informed attorney may negotiate with the State and can properly advise his client whether to go to trial. While aiding the defendant in choosing whether to go to trial, investigation also aids the interests of justice, in that, more cases that should go to trial will. Investigation also benefits the judicial system economically. Cases that should be pled are pled, thereby avoiding the high cost of trial proceedings. Without an adequate understanding of the strengths and weaknesses of a case, a defense attorney stands on shaky ground when giving advice whether to plead guilty or whether to go to trial.

Use of the Investigative Product at Trial

A complete investigation provides information for the defense attorney so that he can match the prosecution's case with an adequate defense. Granted, not all investigations are going to be as fruitful as to prevent any surprises whatsoever, but the likelihood of surprise and unpreparedness are reduced. In addition to signed statements of witnesses, an investigator's report may also consist of diagrams, photographs, aerial photographs of the



crime scene, weather reports, and medical and criminal records which may serve either as impeachment material or as demonstrative evidence.

The investigator, himself, may be called as a witness for the defense to impeach the credibility of the State's witnesses. Often, a witness for the State will testify from faulty memory or misconceptions without any intent to misstate the truth. Nevertheless, the incorrect testimony will go on the record and remain on the record with full force and effect unless challenged. In order for the investigator's testimony to effectively impeach such testimony, it is important not only that the investigator conduct the investigation properly, but that the investigator also testifies without hesitation or lack of ability to recollect and reconstruct the investigation. A complete detailed record of the in-

vestigation from the first hour to the last will help the investigator in such instances.

During the investigator's testimony, he may testify with the use of a witness' signed statement or a detailed report of the interview. The use of such statements or reports, however, has certain ramifications. The State has access to the defense's material used in trial, just as the defense has access to the State's material used in trial. Once a State witness has testified, the test as to whether the defense counsel should be permitted to inspect a prior statement of that witness is, "whether the statement is, or may be, inconsistent with the witness' trial testimony, and thus usable in cross-examination." *Leonard v. State*, 46 Md. App. 631, 638, 421 A.2d 85, 88 (1980). Similarly, if a defense witness, such as an investigator, uses a statement during trial to testify from, or in tes-

timony refers to such a statement, the prosecution may be permitted to inspect such a statement in accordance with *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles*, a defense investigator was called to testify in an effort to impeach the government's witnesses by using statements obtained by the investigator from those witnesses. The trial court ordered that the statements, with irrelevant portions excised, be submitted to the prosecution. When the defense refused to comply, the trial court declined to allow the investigator to testify.

The defense in *Nobles* presented the argument that the production of the statements would violate the attorney work-product doctrine. The Supreme Court recognized that this doctrine, first promulgated in a civil action, *Hickman v. Taylor*, 329 U.S. 495 (1947), likewise applies to a criminal action. The Supreme Court stated in *Nobles* that the work-product doctrine also necessarily applies to the agents of the attorney and specifically, to the attorney's investigator. The Court stated:

[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.

Nobles, 422 U.S. at 238-39.

However, the Court decided that the qualified attorney work-product privilege had been waived by elect-

ing to have the investigator testify about the statements. Earlier in the Court's opinion, Justice Powell, writing for the majority, pointed to the usefulness of allowing the jury to see the investigator's report, to provide insight and the opportunity for the jury to weigh the credibility of the government witnesses and the investigator. The Court stated:

The investigator's contemporaneous report might provide critical insight into the issues of credibility that the investigator's testimony would raise. It could assist the jury in determining the extent to which the investigator's testimony actually discredited the prosecution's witnesses. If, for example, the report failed to mention the purported statement of one witness that "all blacks looked alike," the jury might disregard the investigator's version altogether. On the other hand, if this statement appeared in the contemporaneously recorded report, it would tend strongly to corroborate the investigator's version of the interview and to diminish substantially the reliability of that witness' identification.

Nobles, 422 U.S. at 232.

Although the Supreme Court in *Nobles* mentioned that the irrelevant portions of the investigator's report would not be accessible to the prosecution, the Court also recognized that the decision to excise portions of the report was within the trial judge's discretion. The *Nobles* decision thus left undefined the scope of trial disclosure and the use of an investigator's report.

Along similar lines, the Maryland case of *Worthington v. State*, 38 Md. App. 487, 381 A.2d 712 (1978), established the "verbal completeness" doctrine as the standard by which the prosecution can make use of the defense investigator's report. The circumstances in *Worthington* are very similar to the circumstances in *Nobles*. Through testimony given by the defense investigator, portions of

a State witness' prior written statements were introduced by the defense. The trial court allowed the State to introduce the statements in their entirety in accordance with the doctrine of verbal completeness. The Court of Appeals of Maryland stated:

It is only too clear that the admission of selected excerpts, carefully drawn from a larger work, could conceivably create an inaccurate impression as to the meaning of what was actually said. As previously noted, if denied an opportunity to examine all relevant portions of the statements, the jury would be unable to assess intelligently the credibility of Bray and Ms. Roppelt [the State's witnesses]. Accordingly, we concur with the State's assertion that appellant waived his privilege [attorney work-product] when he elected to have Brunner [defense in-

vestigator] testify as he did.

Worthington, 38 Md. App. at 495, 381 A.2d at 717.

Judge Morton, writing for the court of appeals, cited *Nobles* to refute the defendant-appellant's attorney work-product doctrine argument, holding that the privilege was waived by calling the defense investigator to testify.

The doctrine of verbal completeness as presented in *Worthington* presents a stumbling block for the investigator whose statements are sketchy in detail and which tend to leave out facts unfavorable to the defense. The *Nobles* decision tends to harm the investigator who writes a report about the interview and includes negative statements about the witness interviewed. If such statements and reports are reviewed by a jury, the statements tend to lose all credibility either for lack of detail



or seemingly harsh assessments of a witness' character. Thus, the investigator should be reminded to obtain detailed and complete statements. Also, it is helpful to have the investigator write two separate memoranda. Facts rendered by the witness should be contained in the statement or notes of the interview, while impressions or opinions of the investigator should be contained in a memo to the attorney. Thus, the impressions and/or opinions of the investigator are protected by the attorney work-product doctrine. The need for a second memorandum is eliminated if, as suggested earlier, the attorney accompanies the investigator on the interview and observes the witness first hand. However, most attorneys cannot usually afford the luxury of time to do so, and therefore the investigator must not only investigate, but must also act as the attorney's eyes and ears and convey all the facts necessary to allow the attorney to judge for himself the demeanor and credibility of the witness.

Post-Trial Use of an Investigator

Most court systems have an office that compiles pre-sentence reports after a defendant has been convicted. Such offices, like other government offices, are often overworked, and as a result, the effort put into a pre-sentence report is minimal. The information presented to the court might consist only of the defendant's criminal history and vital information. Other detailed information, such as possible mitigating circumstances, is usually lacking. Thus, the defense attorney should consider using his investigator to look into the defendant's background for any information that may be helpful to the court in sentencing. The attorney should ask his investigator to talk to the defendant's family, people in the defendant's neighborhood, boyfriends or girlfriends, employers, co-workers, teachers, religious leaders and others who may be familiar with

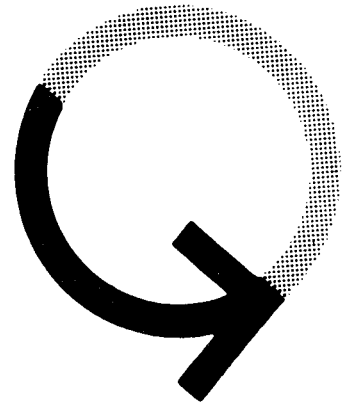
the defendant. Any positive or enlightening information should be brought to the court's attention, and the attorney and investigator should be prepared to substantiate any facts that they may uncover. It is helpful to have employers, teachers, religious leaders, or others to write letters to the court on behalf of the defendant, possibly explaining any mitigating circumstances of which they have knowledge. An investigator may be instrumental not only in finding such persons but also in gathering letters, reports, documentation and other items to present to the court. It is recommended that the attorney become as involved as possible in this step of the process, but as in other stages of the case, the investigator can save valuable time by doing the necessary legwork.

Conclusion

Even the simplest case may have relatively insignificant or hidden facts that could turn the case around. Due to time constrictions, ethical considerations and responsibilities to both the client and to the profession, the lawyer should delegate the job of uncovering such facts to an investigator. The investigator can provide the attorney with a thorough understanding of how an occurrence took place and should provide the information in such a way as to preserve the integrity of the information for later use at trial. The investigator is an invaluable support person. The need for investigation is a critical part of any case.

This article has shown the attorney how to use an investigator while retaining the involvement that an attorney must necessarily have in the investigative process. In addition, the use of the investigative product, both pre-trial and at trial, have been illustrated. With the information provided, the attorney now has an understanding of the importance, the relevance and the structure of good investigation procedures and techniques.

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